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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 2 2 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and IT consulting company.[1] It seeks to employ the beneficiary permanently in the United States as a programmer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the 2005 priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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[1] The AAO notes that the petitioner filed a subsequent I-140 petition for the beneficiary with accompanying ETA Form 9089 filed on July 25, 2008 that the Nebraska Service Center approved on November 30, 2009.

Here, the Form ETA 750 was accepted on March 22, 2005. The proffered wage as stated on the Form ETA 750 is $80,581 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of March 2006. On the petition, the petitioner claimed to have an establishment date of December 1, 2002, a gross annual income of $2,150,532[2], a net income of $35,183, and 40 employees.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

In support of the petition, the petitioner submitted its 2004 and 2005 Forms 1120S, U.S. Income Tax Return for an S Corporation, and bank statements from the petitioner's two accounts with Chase Bank from October 2005 to January 2007.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on December 10, 2007, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements for tax years 2005 and 2006 to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also requested a list of all I-140 immigrant petitions filed by the petitioners with Service Receipt numbers, names of the aliens, and a copy of the corresponding labor certification that identifies the priority date and proffered wage. If any aliens were employed by the petitioner, the director requested copies of their W-2 Forms for 2005 and 2006. The director noted that the petitioner had to establish its ability to pay the beneficiary's proffered wage as well as the proffered wages of other I-140 petition beneficiaries.

In response, the petitioner submitted its Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns for an S Corporation, for the years 2005 and 2006, along with the petitioner's unaudited statement of income for the period ending December 31, 2007 and the petitioner's owner's Forms 1040 for 2005 and 2006. Counsel also submitted a list of eleven I-140 beneficiaries for whom he claimed the petitioner filed I-140 petitions from 2004 to 2007, identifying I-140 receipt numbers, priority dates and prevailing wages for tax years 2004 to 2007.[4] Counsel also submitted the petitioner's W-2 Forms for this list of beneficiaries which includes the beneficiary, for tax years

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[2] The petitioner indicated its gross annual income as 2150,532, which the AAO interprets as $2,150,532.

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[4] The petitioner also submitted partial copies of ETA Forms 750 or 9089, with USCIS Notices of Action for seven additional petitions filed in 2007, as well as two petitions filed in 2004 and one in 2005.

2005 to 2007.[5] Counsel for the petitioner examined tax years 2005 to 2007, and noted that in the priority year, the petitioner only had to establish that it has sufficient funds to pay the amounts due to beneficiary from the priority date until the end of the tax year. Counsel referred to "published" AAO decisions that discuss the prorating of wages in priority years. In counsel's analysis of the petitioner's ability to pay the difference between the wages provided to the beneficiary and the other I-140 beneficiaries, he examines the combined petitioner's net income, net current assets and the adjusted income of the petitioner's owners for tax years 2005 and 2006. With regard to the petitioner's ability to pay the difference between the beneficiary's and other beneficiaries' proffered wages in tax year 2007, counsel refers to the petitioner' audited[6] financial statement for 2007, and the ending balances of the petitioner's two accounts with Chase Bank for 2007.

The tax returns reflect the following information for the following years:

	2005	2006
Net income[7]	$35,813	$49,074
Current Assets	$28,814	$251,109
Current Liabilities	$0	$174,220
Net current assets	$28,814	$69,116

The director determined that the evidence submitted did not establish that the petitioner had either the net income or net current assets to pay the differences between all beneficiaries' actual wages and the proffered wage beginning on the March 22, 2005 priority date, and, on April 10, 2008, denied the petition.

On appeal, counsel asserts that the petitioner's amended tax returns establish the petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage during tax years 2005 to 2007. The petitioner submits copies of amended IRS tax returns for tax years 2005, 2006,

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[5] The beneficiary's W-2 Forms for 2005 and 2006 indicate the petitioner paid him $42,000 in 2005 and $50,000 in 2006.

[6] As previously noted, this 2007 document is not audited.

[7] Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2006, the petitioner's net income is found on Schedule K of its tax return.

and also submits a Form 1120S for tax year 2007.[8] All three documents have a date stamp from the IRS, Morton Grove, Illinois that says "received" as of June 9, 2008. The AAO notes that on the 2005 and 2006 tax returns submitted on appeal, the major changes appear to be the addition of assets under line 2b, "Less allowance for bad debts." There is not accompanying documentation as to why these documents were submitted to the IRS, or what exactly needed to be amended.

The petitioner also submits eleven W-2 Forms for tax year 2007 including the beneficiary's W-2 Form for tax year 2007 that indicates that petitioner paid him $58,200. The petitioner also submits the beneficiary's Earnings statements from October 11, 2007 to May 13, 2008. The latter indicates the beneficiary was paid $4,600 for the month of March 2007 that that his gross pay year to date was $18,400. The petitioner also submits a revised document that shows the names of the petitioner's beneficiaries, their titles, their wages, their W-2 wages, and the difference between the proffered wag and the actual wages and the petitioner's amended net current assets for the respective years.

With regard to the claimed amended tax returns submitted on appeal, the AAO notes that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, the AAO does not accept the amended tax returns for tax years 2005 and 2006 as sufficient evidence of the petitioner's ability to pay the differences between all beneficiaries' actual wages and their proffered wage, and will not discuss them any further in these proceedings. Only the tax returns submitted with the initial petition or in response to the director's RFE will be considered in these proceedings.

As the director stated in his decision, the unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Further, the AAO notes that in its response to the director's RFE, counsel advocates combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage. The director did not comment on this issue; however, the AAO will address it briefly.

This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income

[8] Counsel describes the petitioner's 2007 tax return, submitted to the record on appeal as amended. The AAO notes that the petitioner's 2007 tax return was dated and signed on June 6, 2008, and then subsequently filed with the IRS on June 8, 2008. If this is an amended tax return, the record is devoid of any information on any earlier 2007 tax return filed by the petitioner.

remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

Further, counsel requested that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, the AAO notes that any funds taken out of the petitioner's Chase Bank accounts in one month would no longer be available in future months. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L considered above in determining the petitioner's net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage.

Counsel's reliance on the assets of the petitioner's owner is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm'r. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). USCIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, 3 (D. Mass. Sept. 18, 2003). The petitioner has not demonstrated that any other funds were available to pay the proffered wage.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability

to pay the proffered wage. In the instant case, while the petitioner established that it paid the beneficiary $42,000 in 2005 and $52,000 in 2006, it did not establish that it employed and paid the beneficiary the full proffered wage in either year. Thus it has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in both 2005 and 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[9] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current

[9] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner has not demonstrated that it paid the beneficiary the full proffered wage in any year in question. While the petitioner shows sufficient net current assets in both 2005 and 2006 based on the initial tax returns, to pay the difference between the beneficiary's actual wages and the proffered wage in either year, as the director pointed out, the petitioner has filed multiple petitions during the time encompassed by the beneficiary's priority date and the ensuing time prior to his adjustment of status.[10] Thus, the petitioner needs to establish that it has either paid the proffered wages to the beneficiaries in question or that it has sufficient net income or net current assets to pay the difference between all beneficiaries' actual wages and their proffered wages. With regard to the documentation provided by the petitioner with regard to additional beneficiaries, the petitioner needed $121,162 in additional funds in 2005 and $88,464 in 2006 to pay the difference between the actual wages paid to the beneficiaries identified by the petitioner and their proffered wages. Based on the petitioner's net income and net current assets for tax years 2005 and 2006, the petitioner has not demonstrated its ability to pay the difference between the wages paid to the beneficiary and additional I-140 beneficiaries and their proffered wages out of its net income or net current assets. The AAO further notes that the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2005 or subsequently during 2006. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that a petitioner's increasing profitability may be considered as a factor in examining the petitioner's financial condition and cites *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967). USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows

[10] USCIS computer records indicate that the petitioner has filed 85 petitions, primarily I-129 non-immigrant petitions from 2003 to 2010. In 2006,the petitioner filed 20 petitions, while in 2007,it filed 32 petitions, primarily 1-129 non-immigrant petitions.

throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner had been in business for three years when the labor certification for the instant position was filed, and five years before the instant I-140 petition was filed. With regard to gross receipts, as counsel asserts, the petitioner's gross receipts increased from $2,150,532 in 2005 to $3,087,220 in 2006. The petitioner's tax returns also indicate a $300,000 increase in wages and salaries between 2005 and 2006. However, with regard to officer compensation, a discretionary expense, the petitioner's tax returns indicate that no officer compensation was paid in 2005, and that $6,000 was paid in 2006. Further, the record is devoid of any further evidence with regard to the petitioner's reputation within the industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.